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The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate

Myriam Gicquello*

This paper introduces the findings of social psychology, especially group psychology, into the study of investment arbitration. It argues that arbitrators as members of small groups (i.e. tribunals or divisions in an Investment Court) might be subjected to a number of influences inherent to such collective settings – factors already proven to be at play in domestic courts. In turn, identifying those provide an opportunity to reduce their impact on the decision-making of legal adjudicators through the implementation of adequate remedies. Adopting one of the most popular models of group decision-making – groupthink –, this paper discusses the manifestations and implications of this theory for Investor-State Dispute Settlement both in its ad hoc and institutionalised forms. Specifically, it claims that the Investment Court defended by the EU and generally posited in some agreements might not be that different from the current system from a socio-psychological perspective, and hence could be further improved.

I. Introduction.

The reform of investment arbitration is now a subject on everyone's lips – from academics to practitioners in the field. Indeed, while the number of disputes submitted to investment tribunals rose exponentially from the late 20th Century, this alternative mode of

conflict resolution is now confronted to "growing pains"[1]. This backlash is notably fed by a number of criticisms leading to question the legitimacy of the system, some even arguing that investment arbitration is now facing a crisis of legitimacy[2]. This paper does not aim to contribute to the debate on the legitimacy of international arbitration – as it will require to engage in broader considerations. Nevertheless, amounting to a legitimacy crisis or not, criticisms against arbitration are still standing. Plus, the need for reform can also be justified on other grounds – namely that first, justice must not only be done but also perceived to be[3], and second, the growth of a system necessarily calls for its re-evaluation leading to potential adjustments[4].

Accordingly, the EU is now advocating for the complete institutionalisation of Investor-State Dispute Settlement (ISDS) with the creation of a Multilateral Investment Court

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[1] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1523.

[2] Ibid.

[3] R. v. Sussex Justices; Ex parte McCarthy (1924) 1 KB 256. Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211.

[4] Susan D Franck, 'Integrating Investment Treaty Conflict and Dispute Systems Design' (2007) 92 Minnesota Law Review 161, 163.('As a system develops and undergoes fundamental growth, reconsideration of its efficacy can promote both the integrity and the legitimacy of the system to ensure it provides appropriate services to its stakeholders')

(MIC)[5]. To that end, it already introduced Investment Court Systems (ICSs) – to be latter replaced by the MIC – in its new generation of Investment Protection Agreements (IPAs). This new mechanism is notably characterised by the creation of both Investment and Appeal Tribunals with a limited number of tenured Members as those features aim to respond to two well-known criticisms about investment arbitration touching upon the alleged lack of independence and impartiality of arbitrators and the lack of consistency of arbitral jurisprudence[6]. Yet, it results from the existing literature that those features do not prevent legal adjudicators to be influenced by behavioural factors[7]. Therefore, the creation of an investment court might not be an absolute remedy against the aches of ISDS. Hence, the argument that the EU, in institutionalising investment arbitration, certainly considered institutional shortcomings, but failed to account for behavioural influences emanating from small group decision-making.

This paper uses a socio-psychological framework to analyse the current system of ad hoc arbitration and these new ICSs through the lens of the group dynamics literature,

[5] Council of the EU, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (1 March 2018): <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 26 March 2019.

[6] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' (2016), <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 26 March 2019.

[7] For a review, see below.

especially against the variables of groupthink[8]. What is social psychology? It is "the scientific investigation of how the thoughts, feelings, and behaviours of individuals are influenced by the actual, imagined, or implied presence of others"[9]. We could thus expect group decision-making to be different from its individual counterpart as groups differ from and are more complex than the sum of each member contribution[10]. Hence, the idea of "group mind" and the furthering of group psychology – as a subfield of social psychology[11]. The second question we should ask ourselves before starting any importation of group psychology to investment arbitration is whether tribunals and divisions can be treated as (small) groups from a socio-psychological perspective. We could reply in the affirmative upfront, but it might be a bit more difficult than that as there is actually no unique definition of what constitutes a group or not in the social / group psychology literature. This paper adopts a comprehensive one proposed by David and Frank Johnson:

[8] Specifically, emphasis will be made on the provisions dealing with the Tribunals of First Instance as the ones dealing with Appeal Tribunals are less detailed.

[9] Gordon W. Allport, "The Historical Background of Modern Social Psychology", in Gardner Lindzey (eds), *Handbook of Social Psychology, Vol.1* (Cambridge: Addison-Wesley 1954), 5.

[10] See the distinction between personal and social identities: Henri Tajfel and John C. Turner, "The Social Identity Theory of Intergroup Behaviour" in Stephan Worchel and William G. Austin (eds), *Psychology of Intergroup Relations* (Nelson-Hall 1986).

[11] William McDougall, *The Group Mind: A Sketch of the Principles of Collective Psychology* (Library of Alexandria 1920). Muzafer Sheriff, Carolyn W. Sheriff, *Social Psychology* (New York: Harper and Row 1969), 283: ('We cannot do justice to events by extrapolating uncritically from man's feelings, attitudes, and behaviour when he is in a state of isolation to his behaviour when acting as a member of a group. Being a member of a group and behaving as a member of a group have psychological consequences').

> A group is two or more individuals in face-to-face interaction, each aware of his or her membership in the group, each aware of the others who belong to the group, and each aware of their positive interdependence as they try to achieve mutual goals[12].

Thus, ad hoc tribunals and the divisions within the Investment and Appeal Tribunals (in the ICSs and eventual MIC structures) are actually groups as respectively their arbitrators and Members respond to those characteristics. Indeed, those individuals interact with one another and influence each other notably through deliberations, perceive themselves as members of that setting, are interdependent or linked as they cannot deny their duty to adjudicate, share the mutual goal to solve the dispute, could be considered to satisfy a need (be it prestige, income, or else[13]) through their joint association, and have their interactions structured by a set of roles and norms (e.g. procedural rules). Additionally, another fundamental aspect in the identification of a group is the outsiders' recognition of its existence[14]. This condition is also met in arbitration as tribunals are notably acknowledged by the disputants. Finally, the qualification of those former as (small) groups is also analogously supported by the judicial decision-making literature treating US benches as such[15]; but also, by behavioural

[12] David W. Johnson, Frank P. Johnson, *Joining Together: Group Theory and Group Skills* (Englewood Cliffs, NJ US Prentice Hall 1987), 8.

[13] Thomas Schultz and Robert Kovacs, 'The Law is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' in Julio C. Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (Open University Press 2016).

[14] Rupert Brown, *Group Processes* (2nd edition, Wiley-Blackwell 2001).

[15] E.g. Wendy L Martinek, 'Judges as Members of Small Groups' in David E Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (Oxford University Press 2010). Neal Devins and Will Federspiel,

international law and economics scholars calling for the use of group dynamics to examine international tribunals or alternative dispute resolution[16].

We have to admit that employing psychological findings to study legal institutions might not appear evident at first sight. One might think that arbitrators – or any legal decision-maker – are not subjected to the conscious or unconscious influences pervasive in everyday decision-making. After all, those people are thought to be well-educated through their time spent in law school where they should have been taught legal or syllogistic reasoning: You start with the law, you apply it to the fact, and then you have your answer[17]. Yet, it has been repeatedly shown that experience, expertise, and cognitive abilities are no inoculation against biased decision-making (defined here as the departure from the requirements of rational choice theory)[18]. Plus, it is also acknowledged in the legal literature that the "law in the book" is different from the "law in action"; as adjudicators do not apply mechanically the law to the facts, but instead are equally subjected to a range of extra-legal factors be they institutional, behavioural, or else[19]. Yet, considering that extra-legal factors

'The Supreme Court, Social Psychology, and Group Formation' in David E Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (Oxford University Press 2010). For a review, see below.

[16] Tomer Broude, 'Behavioral International Law' (2015) 163 University of Pennsylvania Law Review 1099. Anne van Aaken, 'Behavioral International Law and Economics' (2014) 55 Harvard International Law Journal 421.

[17] Matthew C Stephenson, 'Legal Realism for Economists' (2009) 23 Journal of Economic Perspectives 191.

[18] Keith E Stanovich, *What Intelligence Tests Miss: The Psychology of Rational Thought* (Yale University Press 2010). Daniel Kahneman, 'Judgment and Decision-Making: A Personal View' (1991) 2 Psychological Science 142.

[19] Stephenson (n 17).

are at play alongside legal ones is not enough, if we fail to identify those or if that identification relies on false premises about human decision-making behaviour. Unfortunately, this was the case with law and economics built on inaccurate assumptions: rational choice theory and unbounded rationality[20]. In that context, a number of models – claiming to be both normative and descriptive of human behaviour in presenting how people should and do in fact make decisions – were designed endorsing those requirements of rational judgment (i.e. comprehensive search of information and its subsequent compensatory evaluation)[21]. Yet, those being very demanding, an individual could not realistically be expected to comply with all of their steps when approaching any decision-making task; reality that was even empirically proven with behavioural law and economics[22]. Thus, ad hoc arbitration and ICSs might not be that different after all from a socio-psychological perspective.

Section 2 provides a review of the literature on the bounded rationality of courts and tribunals. Section 3 presents groupthink theory and analyses both ad hoc and institutionalised

[20] Russell Korobkin, 'What Comes After Victory for Behavioural Law and Economics?' (2011) 2011 University of Illinois Law Review 1653, 1668 ('The rational choice tradition usually assumes, however, that all humans have computer-like ability to identify facts in the world, calculate the likelihood of various, probabilistic future outcomes associated with difference choice options, and make decisions that maximise subjective expected utility, given available information').

[21] Gerd Gigerenzer and Daniel G Goldstein, 'Betting on One Good Reason: The Take the Best Heuristic' in Gerd Gigerenzer, Peter M Todd and ABC Research Group (eds), *Simple Heuristics That Make Us Smart* (Oxford University Press 2000).

[22] Russell B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051.

arbitration using this model. Section 4 considers procedures to account for the previously identified behavioural influences in arbitral decision-making. Section 5 draws some concluding remarks.

II. Legal Decision-Makers as Bounded in Rationality.

To reiterate, as it might be quite obvious **now** that human beings do not or cannot follow all the requirements of the rational choice theory for every single decision they make, it has not always been the case. Yet, Herbert Simon's concept of bounded rationality[23] – then extensively empirically supported through experimental psychology in both its cognitive and social branches – proved that the expectations derived from economics fell short of accuracy in that they had very little predictive power and were therefore not matching reality[24]. Hence, the behavioural economics methodology endorsing this concept as one of its three pillars to describe what really happens in legal decision-making[25]. Nevertheless, this recent change of paradigm does not mean that the insights of economics theory need to be ignored. Indeed, due to the parsimony of this latter, behavioural law and economics still advocates for the use of its predecessor as a starting point to study legal phenomena[26]. In the arbitral context, this

[23] Herbert A Simon, 'Invariants of Human Behavior' (1990) 41 Annual Review of Psychology 1, 7.

[24] Broude (n 16).

[25] Cass R Sunstein, Christine Jolls, and Richard H Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471.

[26] Van Aaken (n 16)

enterprise was conducted by Thomas Schultz applying economics methodology to identify the plausible material / rational incentives determining arbitrators' behaviour[27].

This paper continues this literature in trying to identify the influences at play on arbitrators' decision-making applying a behavioural economics methodology. This approach differs from economics in that it explicitly acknowledges that human decision-making behaviour is bounded in three respects: rationality, willpower, and self-interest[28]. Of interest here is the concept of bounded rationality, even though the other bounds have been adapted in the legal context as well – yet to a rather limited extent. For example, studies on bounded willpower permitted to understand why Israeli Parole Board judges were more likely to approve parole – hence departing from the status quo – in the early day or after a lunch or snack break, while the reverse tendency (denying parole: keeping the status quo) was more likely at the end of the day or before lunch or a snack[29].

In light of the new insights that could be gained with such a behavioural analysis of law, bounded rationality has first been used in the study of domestic legal decision-making –

[27] Thomas Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics' (2015) 6 Journal of International Dispute Settlement 21.

[28] Richard A Posner, 'Rational Choice, Behavioural Economics, and the Law' (1998) 50 Stanford Law Review 1551. Sunstein, Jolls and Thaler (n 25).

[29] Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 Proceedings of the National Academy of Sciences of the United States of America 6889. Roy F Baumeister and John Tierney, *Willpower: Why Self-Control Is the Secret to Success* (Penguin 2012). (Glucose as a crucial component of willpower and the activity of judging depleting this resource.)

particularly in the US using judges and jurors as frameworks for analysis[30]. Although the experimental literature focusing on those actors only emerged in the second half of the 20th Century, it was claimed as early as 1921 that this avenue was worth investigating[31]. Thus, a number of extra-legal factors – cognitive, social, and motivational – susceptible to bear on the judicial decision-making process as well as theories of judicial behaviour have been identified and empirically tested[32]. Accordingly, it was found that judges are subjected to a number of cognitive illusions in the courtroom – such as coherence or confirmation bias, anchoring, framing, hindsight bias (or knew-it-all-along effect), representativeness heuristic, and egocentric bias – yet sometimes to a lesser extent than a layperson[33]. Furthermore, it was also proven that legal adjudicators are socially influenced in that their initial (i.e. individual) views are more likely to change after deliberation with their colleagues[34]. Finally, the motivations of the decision-maker should not be ignored as well as the study of those latter could explain why 'given a similar set of environmental constraints, men with different

[30] E.g. on jury decision-making Nancy Pennington and Reid Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 Cardozo Law Review 519.

[31] Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press 1921)

[32] Richard A Posner, *How Judges Think* (Harvard University Press 2008). Listing nine theories of judicial behaviour: the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological, and the legalist.

[33] See e.g. Chris P Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich 'Inside the Judicial Mind' (2001) 86 Cornell Law Review 777. Dan Simon, 'A Third View of the Black Box: Cognitive Coherence' (2004) 71 The University of Chicago Law Review 511.

[34] On choice shifts: Thomas G Walker and Eleanor C Main, 'Choice Shifts in Political Decision-Making: Federal Judges and Civil Liberties Cases' (1973) 3 Journal of Applied Psychology 39. On panel effects: Pauline T Kim, 'Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects' (2009) 157 University of Pennsylvania Law Review 1319.

incentives will behave differently'[35]. This motivated reasoning literature applied to legal decision-making permitted in turn to highlight some goals judges might hold and which could bear on their decisions. Developing a 'partial topology of judicial goals', Lawrence Baum posited that those could relate to the 'content of decisions', or the judges' 'life on the court', 'career', or 'personal standing'[36].

Even though extensive evidence highlighted the bounded rationality of domestic legal actors (judges but also lawyers[37]), behavioural international law and economics is quite limited (as compared to its domestic equivalent) despite the offered potential[38]. Thus, its development on the international plane is now praised both at substantive and procedural levels[39]. Hence, this methodology has already been adopted to investigate substantive legal issues. In particular, Lauge Poulsen applied some cognitive biases to policy-makers to understand the negotiation and conclusion of investment treaties between developed and developing countries[40]. On a 'procedural' level, this kind of research is only starting to

[35] Greg A Caldeira, 'Judicial Incentives: Some Evidence from Urban Trial Courts' (1977) 4 Iustitua 1, 5.

[36] Lawrence Baum, 'What Judges Want: Judges' Goals and Judicial Behaviour' (1994) 47(3) Political Research Quarterly 749, 752.

[37] See e.g. Andrew J. Wistrich and Jeffrey J. Rachlinski, 'How Lawyers' Intuitions Prolong Litigation' (2013) 86 Southern California Law Review 101.

[38] Broude (n 16). van Aaken (n 16).

[39] Broude (n 16), 1103 ('In any events, behavioural analysis must be added to the international legal research toolbox of alternative research methodologies, each of which should be employed where it is illuminating and can be pursued with intellectual honesty').

[40] Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2017).

flourish: whereas Christopher Drahozal was already recognising the benefits of such an analysis of arbitration in 2004[41], it is only almost a decade later that this was done with empirical studies showing that arbitrators are impacted by the same cognitive illusions as domestic judges[42]. As to the motivations of those former, they were also considered as, in the same way as in judicial decision-making, they determine their behaviour[43]. Finally, while the analyses conducted in the US treated juries of twelve jurors or benches of three judges as small groups subjected to a number of social influences (conscious or not), this has seldomly been implemented in the arbitral framework (i.e. attempts to demonstrate how membership in an arbitral tribunal specifically appointed to resolve an investment dispute changes arbitrators' behaviours). Indeed, most of the literature dealing with the social aspects of arbitration focused on the larger arbitral 'close-knit'[44] from a sociological perspective[45] and more recently a network analysis. This latter being conducted by Sergio Puig demonstrating that both "the interconnection among arbitrators as well as the position that each member

[41] Christopher Drahozal, 'A Behavioural Analysis of Private Judging' (2004) 67 Law and Contemporary Problems 105.

[42] Edna Sussman, 'Arbitrator Decision-Making – Unconscious Psychological Influences and What You Can Do About Them' (2015) 4 Yearbook of International Arbitration 69. Susan D. Franck, Anne van Aaken, James Freda, Chris Guthrie, and Jeffrey J. Rachlinski, 'Inside the Arbitrator's Mind' (2017) 66 Emory Law Journal 1115.

[43] Schultz and Kovacs (n 13).

[44] Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' (2017) 46 The Journal of Legal Studies 371, 371.

[45] E.g. Yves Dezalay and Bryant G Garth, *Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press 1996). Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators?' (2012) 28 Arbitration International 161.

occupies in the social hierarchy affect group behaviour and outcomes" [46]. But, taking arbitral tribunals – drawn from this community – as a subject of study could equally be beneficial to understand arbitral decision-making (behaviours and outcomes)[47]. It is even worth noting that this gap in the arbitral literature is not due to the lack of or the inappropriateness of psychological findings (or theories) to be applied in a legal context as the US have been particularly keen to apply psychology to their judicial decision-making systems.

III. Group Decision-Making: When the Crowd Deceives.

Now that an arbitral tribunal or division has been (successfully) labelled as a group, this qualification allows us to import the insights of group psychology into the ISDS framework. It is especially important to consider those findings due to the ample literature demonstrating that groups fail to live up to their potential. Indeed, while common sense or wisdom suggests that the more people participate in the decision-making process, the better the decision; this expectation of synergy is far from being met as emphasised by J. Richard Hackman concluding that:

[46] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) The European Journal of International Law 387, 389-390.

[47] See e.g. Tony Cole, Pietro Ortolani, Sean Wright, 'Arbitration in its Psychological Context: A Contextual Behavioural Account of Arbitral Decision-Making' in Thomas Schultz and Federico Ortino (eds) *Oxford Handbook of International Arbitration* (Oxford University Press forthcoming): ('Arbitrations do not occur in a vacuum, and an accurate understanding of arbitrator reasoning can only be achieved by combining the insight available from traditional psychological research with an awareness of the social influences that play a central role in structuring the profession').

> I have no question that when you have a team, the possibility exists that it will generate magic, producing something extraordinary, a collective creation of previously unimagined quality or beauty. But don't count on it[48].

It is also questionable whether the conditions for group benefits to occur are present within the arbitral framework. Indeed, taking social facilitation and compensation as illustrations, the former requires a simple, well-learnt, task (as opposed to complex and poorly-learnt) while for the latter, members should be aware of the discrepancies between themselves and be sufficiently motivated to compensate for those[49]. Plus, it was equally demonstrated that the instances in which group outcomes are superior to the ones generated by an individual involved an intellective decision-making task (i.e. demonstrable or mathematical)[50]. Yet, legal decision-making is not one of the sorts but rather a judgmental one "for which there does not exist a demonstrably correct answer"[51].

[48] J. Richard Hackman, 'Why Teams Don't Work. Interview by Diane Coutu', (2009) Harvard Business Review <https://hbr.org/2009/05/why-teams-dont-work> accessed 26 March 2019. See also Norbert L Kerr, Robert J MacCoun and Geoffrey P Kramer, 'Bias in Judgment: Comparing Individuals and Groups' (1996) 103(4) Psychological Review 687 finding that there is in fact no answer to the question "Which is more biased, individuals or groups?" as this answer depends on a number of conditions: size of the group, magnitude of individual bias, location and definition of the bias, and the normative ideal.

[49] Robert B. Zajonc, "Social Facilitation" (1965) 149 Science 269. Kipling D. Williams, Steven J. Karau, "Social Loafing and Social Compensation: The Effects of Expectations of Co-Workers Performance" (1991) 61 Journal of Personality and Social Psychology 570.

[50] Patrick R Laughlin and Alan L Ellis, 'Demonstrability and Social Combination Processes on Mathematical Intellective Tasks' (1986) 22 Journal of Experimental Social Psychology 177.

[51] Ibid, 177.

This loss in group performance was thus extensively studied to highlight a number of phenomena and conditions favouring their appearance, necessary enterprise if we have the pretention to design efficient, optimal, institutions[52]. It should be noted that one of the reasons why groups were thought to outperform individuals has to do with the opportunity to communicate the former offer in light of the cognitive limitations of the latter[53]. Nevertheless, it has been proven that group communication is not sufficient to ensure a better outcome (as compared to individual decision-making) but instead can be detrimental[54]. This is notably due to the fact that deliberation entails a number of social and informational influences leading in turn to four independent problems: amplification, cascades, hidden profiles, and polarisation[55]. Indeed, Cass Sunstein and Reid Hastie found that group discussion leads to an amplification of the individual errors of its members, to follow another member for reasons unrelated to the task (e.g. order of allocution in the group), to a failure to share private (unshared) information as members instead focus on common (shared) knowledge, and to more extreme positions than the initial ones held before deliberation[56]. On

[52] Steven R Elliott and Michael McKee, 'Collective Risk Decision in the Presence of Many Risks' (1995) 48(4) KYKLOS 541. See also below.

[53] See Cass R Sunstein and Reid Hastie, *Wiser: Getting Beyond Groupthink to Make Groups Smarter* (Harvard Business Review Press 2014). citing Aristotle and John Rawls.

[54] Christoph Engel, 'The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature' (2010) 6(4) Journal of Institutional Economics 445, 463 ('Group discussion can have a rationalizing effect, but it can also radicalize judgment and decision-making').

[55] Sunstein and Hastie (n 53)

[56] Ibid.

that last problem – polarisation – its role has already been assessed in legal decision-making (in the jury context) and its implications formulated for courts[57].

As group polarisation was used to explain institutional decision-making fiascos, it is also the case of groupthink theory: a linear (i.e. causal) model of group decision-making developed by Irving Janis and Leon Mann[58]. It is equally relevant to apply it to arbitral decision-making due to its transposition in a wide range of real-world contexts[59]. This extensive use was even facilitated by the simplicity of the model. Yet, as seen before with economics theory, the advantage of parsimony presents some adverse effects. Indeed, despite the model's popularity, the few empirical studies that have been conducted only "either partially supported or did not support the model"[60]. Hence, the ensuing theorisation of the Group General Problem-Solving (GGPS) model by Ramon Aldag and Sally Fuller claiming to be "a general, descriptive complement for the more narrowly applicable, deterministic, and prescriptive groupthink model"[61]. Nevertheless, it is acknowledged that groupthink should

[57] Cass R Sunstein, 'The Law of Group Polarization' (John M. Olin Program in Law and Economics Working Paper No. 91 1999).

[58] Those sharing in fact some characteristics: see below. On Groupthink: Irving L. Janis, *Victims of Groupthink* (Houghton Mifflin 1972). Irving L. Janis, Leon Mann, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment* (Free Press 1977).

[59] James K Esser, 'Alive and Well after 25 Years: A Review of Groupthink Research' (1998) 73 Organizational Behavior and Human Decision Processes 116.

[60] Won-Woo Park, 'A Comprehensive Empirical Investigation of the Relationship among Variables of the Groupthink Model' (2000) 21 Journal of Organizational Behaviour 873, 874.

[61] Ramon J Aldag and Sally Riggs Fuller, 'Beyond Fiasco: A Reappraisal of the Groupthink Phenomenon and a New Model of Group Decision Processes' (1993) 113 Psychological Bulletin 533, 547. Similarly: Sally Riggs Fuller and Ramon J Aldag, 'The GGPS Model: Broadening the Perspective on Group Problem Solving' in

still be the starting point of inquiry as GGPS might be unfeasible to transpose in practice due to the number of variables it comports – constraining the researcher to pick and choose which part of the model deserves attention[62]. Therefore, this paper uses the initial variables identified by groupthink – those latter being still acknowledged in the GGPS though reformulated[63].

A. What is Groupthink?

Groupthink, as a pathology affecting group decision-making, has been labelled "one of the most influential in the behavioural sciences"[64] while becoming "almost universal"[65]. This phenomenon, first identified by Irving Janis, was defined as 'a deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures'[66]. Engaging in groupthink is therefore the opposite of what is required to arrive at a rational or

Marlene E Turner (ed), *Groups at Work: Theory and Research* (Routledge 2000), 4. (GGPS as 'realistic rather than deterministic, comprehensive rather than concise')

[62] Aldag and Fuller (n 61), 547 ('It will be premature to abandon the groupthink model').

[63] To avoid any confusion between the two models, groupthink's terminology is adopted in this paper.

[64] Marlene E. Turner and Anthony R. Pratkanis, "Twenty-Five Years of Groupthink Theory and Research: Lessons from the Evaluation of a Theory" (1998) 73 Organisational Behaviour and Human Decision Processes 105, 105.

[65] Aldag and Fuller (n 61), 533.

[66] Janis (n 58), 9. ('A mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action…')

optimal decision (i.e. the consideration and weighting of all alternatives). This mode of thinking resembles polarisation in some respects as the latter entails that:

> **Like-minded people**, engaged in discussion with one another, may lead each other in the direction of error and falsehood, simply because of the **limited argument pool** and the **operation of social influences**[67].

Furthermore, those social and informational influences being mainly unconscious, they are likely to occur even in the absence of strategical decision-making[68]. Accordingly, Irving Janis and Leon Mann thus elaborated on this concurrence-seeking tendency and came up with this causal model of groupthink; according to which a number of antecedent conditions favour the appearance of symptoms, in turn leading to defects in the decision-making process, resulting in poor decision outcomes[69].

As far as the antecedent conditions are concerned, it was theorised that a high level of cohesiveness coupled with structural faults of the organisation (i.e. insulation of the group, lack of leader impartiality, lack of procedural norms, and member homogeneity) as well as a provocative situational context (i.e. high stress induced from external threats with low hope of better solution than leader's, and low temporary self-esteem induced by recent failures, difficulties in current decision-making task, and/or moral dilemmas) lead to symptoms. Those

[67] Sunstein (n 57), 30 emphasis added: Note that those dimensions of homogeneity, de-individualisation (collectivisation), limited information, and likelihood of errors and falsehood are variables of groupthink.

[68] Sunstein and Hastie (n 53). Sunstein (n 57).

[69] Janis and Mann (n 58).

latter generating "an overestimation of the group, closed-mindedness, and pressures towards uniformity"[70] as they consist in an illusion of invulnerability, a belief in inherent group morality, a collective rationalisation, the stereotyping of outsiders, self-censorship, an illusion of unanimity, pressure on dissenters, and self-appointed mind-guards. In turn, these are assumed to produce certain defects such as an incomplete survey of alternatives and objectives, a failure to re-examine the preferred choice and rejected alternatives, a poor information search and a selective bias in processing information, and the failure to develop contingency plans. Ultimately, all these forces entail a low probability of reaching a successful, optimal, outcome. Therefore, applied to ad hoc investment arbitration or to the Investment Court, this linear framework could serve as a basis for their evaluation – i.e. whether their design favours or not such a faulty decision-making.

B. Groupthink in Ad Hoc Arbitration?

The lack of coherence and consistency of arbitral jurisprudence has been identified as one of the core criticisms against ISDS deserving attention[71]. Indeed, this feature is highly problematic in hindering both the legitimacy and predictability of the system in turn leading to adverse effects on its stakeholders (i.e. either a reluctance to invest for foreign investors or a regulatory chill for host States)[72]. Yet, due to the fragmentation of the investment treaty

[70] Paul't Hart, 'Irving L. Janis' Victims of Groupthink' (1991) 12 Political Psychology 247, 259.

[71] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 29 October-2 November 2018)': <https://undocs.org/en/A/CN.9/964> accessed 6 May 2019.

[72] Kaufmann-Kohler and Potestà (n 6).

system – both substantially and procedurally – we could not possibly expect a harmonious jurisprudence anyways. Hence, the distinction between justified and unjustified inconsistencies, the latter being undesirable as they consist in different interpretations within the same investment treaty as opposed to the former occurring across different ones[73]. This lack of consistency has been attributed to the lack of a doctrine of precedent, but surely there must be some other factors – as other international adjudicative bodies seems to do better; and as such unjustified inconsistencies should not exist if legal decision-making was indeed deprived of any extra-legal influences (i.e. mechanical application of the law). Accordingly, it was previously mentioned that the attempts to identify those latter focused on the cognitive, motivational, and social influences at play on the decision-makers themselves. In the arbitral framework, the background of arbitrators (i.e. their policy preferences and ideologies) was even shown by Michael Waibel and Yanhui Wu to influence outcomes[74].

As the background, motivations, and cognition of arbitrators might be responsible for unjustified inconsistencies, social influences need to be equally considered in this field. To that end, the application of groupthink theory to the current ISDS system allow us to not only assess **why** and but also **how** this faulty decision-making process might contribute to this state of uncertainty characterising investment arbitration. To answer those interrogations, the

[73] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November-1 December 2017) Part II': <https://undocs.org/en/A/CN.9/930/Add.1/Rev.1> accessed 6 May 2019.

[74] Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017): <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf> accessed 8 July 2019. Note that they also posit that a standing court might even promote those influences.

unjustified inconsistencies pervading the interpretation of the Most-Favoured-Nation Treatment (MFN) clause in jurisdictional issues are used as an indicator.

The extension of the MFN clause to dispute settlement provisions has been the subject of overt inconsistencies in the past two decades. Starting with the award opposing Maffezini to the Kingdom of Spain rendered in 2000 – allowing such an application of MFN clauses under certain circumstances – the jurisprudence is now far from being constante, other tribunals adopting the opposite stance[75]. These disputes have thus generated a number of conflicting views and dissenting opinions and it is now accepted that some arbitrators are generally opposed to the inclusion of dispute settlement into the scope of the MFN clause, while others have produced a number of opinions to the contrary effect[76]. Accordingly, the awards dealing with the use of an MFN clause in order to bypass litigation requirements prior to the initiation of an arbitration will be the object of this analysis. In this matter, fourteen awards have been rendered between 2000 and 2013, nine favouring and five rejecting the extension of an MFN clause's scope to dispute settlement[77].

[75] *Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000. See report: UNCTAD, *Most-Favoured-Nation Treatment - UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2010), < https://unctad.org/en/Docs/diaeia20101_en.pdf> accessed 26 March 2019.

[76] *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011; *Hochtief AG v Argentina*, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas Q.C., 07 October 2011; *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Dissenting opinion of Judge Charles N. Brower, 15 August 2012.

[77] Favouring the application of an MFN clause to dispute settlement: *Maffezini v Spain*, (n 75). *Siemens AG v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Gas Natural SDG SA v*

In the four disputes brought under the Argentina-Germany BIT in which the MFN clause was invoked to bypass an eighteen-month pre-arbitral litigation requirement, two awards ruled in favour of such a use, while the two others rejected it[78]. The awards favouring the use of an MFN clause endorsed the arguments that its wording encompasses dispute settlement provisions; that the Parties intended the promotion and creation of conditions favourable to investment; that the pre-arbitral litigation requirement is a matter of admissibility and not of jurisdiction of the tribunal since it prescribes the manner an already given right has to be exercised; and finally that the location of an international arbitration has no incidence. However, the other trend of awards decided otherwise – while faced with the same clause – recognising the involvement of jurisdictional and consent issues; denying the application of the MFN clause to dispute settlement due to its wording; applying the

Argentina, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005; *Suez and others v Argentina*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006; *Telefónica v Argentina*, ICSID Case No ARB/03/20, Decision of the tribunal on Objections to Jurisdiction, 25 May 2006. *National Grid v Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez and others v Argentina*, ICSID Case No ARB/03/19, Decision on Jurisdiction, 03 August 2006; *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Final Award, 21 June 2011; *Hochtief AG v Argentina*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011. Rejecting this interpretation: *Wintershall v Argentina*, ICSID Case No ARB/04/14, Award, 8 December 2008; *ICS v Argentina*, PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012; *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Award, 22 August 2012; *Teinver SA v Argentina*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012; *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan,*, ICSID Case No ARB/10/1, Award, 2 July 2013; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL PCA Case No 2011-06, Award on Jurisdiction, 18 July 2013.

[78] In favour: *Siemens AG v Argentina*, (n 77); *Hochtief AG v Argentina*, (n 77). Against: *Wintershall v Argentina*, (n 77)*; Daimler Financial Services AG v Argentina* (n 77).

principles of effectiveness, territoriality, and contemporaneity; and rejecting the interpretation relying on the object and purpose of the treaty.

Such contradictions can be associated to the initial views or preferences held by a member of the tribunal as the same clause and context leads to systematic unjustified inconsistencies, which in turn makes the selection of arbitrators by the parties an even more crucial matter[79]. Plus, as emphasised in one of those awards, this lack of consistency is not fundamentally due to differences in wording between the different BITs, but rather "results from a fundamental difference of view between the various arbitrators"[80]. Indeed, glancing at the tribunals' composition confirms this statement since it highlights trends and preferences among arbitrators – those latter being repeatedly involved[81] – suggesting that social influences have some role. But, why and how do those translate into practice? As seen, groupthink theory is able to provide an answer to those questions with its different components.

[79] Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109 American Journal of International Law 761 (considering that party-appointment in arbitration is an important component for both the operation and the legitimacy of the investment regime). See also Waibel and Wu (n 74) acknowledging the influence of the background (policy preferences) of arbitrators.

[80] *ST-AD GmbH v. Republic of Bulgaria* (n 77), §386.

[81] These fourteen awards had a potential to involve forty-two different arbitrators, yet only twenty-eight were appointed with Charles Brower involved in five of those, and Brigitte Stern, Christopher Thomas, Pierre-Marie Dupuy, and Domingo Janeiro respectively in two disputes. It is also worth noting that these actors expressed in writing their views on the interpretation to be given to an MFN clause.

Looking at the range of available arguments resulting from the jurisprudence mentioned above, it is fair to say that those unjustified inconsistencies found their roots in the processing of information which differs according to the arbitrators and tribunals involved. This interpretation of the submitted arguments is thus dependent on the actors in charge of it, those latter being subjected to numerous behavioural influences (especially social ones as illustrated by groupthink). Besides, the defects highlighted by the theory almost all relate to this data interpretation phase[82] and they do present the potential to explain the unjustified lack of consistency[83]. Indeed, the aforementioned tribunals having access to more or less the same pool of arguments – through the parties' submissions – we can realistically posit that this faulty information processing is certainly due to the background and initial preferences of arbitrators (through confirmation bias) but equally to social considerations (i.e. group polarisation and hidden profiles already identified as independent problems above)[84].

Furthermore, those defects are translated through a range of symptoms which are also witnessed in the current system as well. The collective rationalisation of the outcome is even quite noticeable if we take a closer look to the reasoning of the four awards mentioned above. Indeed, if we account for the composition of the tribunal alongside their initial preferences and the fact that the range of available arguments for one outcome or the other, it is possible to 'guess' the position that has been adopted by the arbitral tribunal – especially with issues

[82] To the exception of a poor information search (i.e. data collection phase) and the failure to develop contingency plan.

[83] Specifically, an incomplete survey of the conflicting evidence, a failure to re-examine the preferred choice and the rejected alternatives, and a selective bias in processing the information.

[84] All those influences, biases, have already been evidenced in the legal framework: see above.

on the scope of the MFN provision as it is a controversial subject with strongly held opinions – which is compatible with the claim that legal reasoning is only a post-rationalisation of an outcome[85]. In turn, this means that tribunals in light of the wide range of conflicting arguments presented before them just have to pick-and-choose – and this is what would participate to the unjustified inconsistencies settling over time. Finally, a pressure on dissenters, self-censorship, and an illusion of unanimity are also responsible for faulty processes[86]. Those might in fact be already at play in the current system through conformity and panel effects and strategic decision-making (already evidenced in the courtroom) and later acknowledged in an opinion written by Professor Domingo Bello Janeiro[87].

As to the why question, the antecedent conditions of groupthink are the starting point. There is one limitation, however, in that those cannot be exhaustively considered in the current context due to the secrecy of the deliberations and the personal dimension of some of them (i.e. stress and self-esteem tied to the situational context). Nevertheless, this is not problematic as in any case not all of them need to be present to have a manifestation of groupthink (symptoms, defects, and less than optimal outcome)[88]. Of particular interest, are the cohesiveness and homogeneity conditions – the latter being already a factor responsible for group polarisation. On the former, while it was initially considered as necessary for

[85] See e.g. Posner (n 32).

[86] Note that those groupthink symptoms also seem to feed each other.

[87] *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Opinion of Professor Domingo Bello Janeiro, 16 August 2012. See also above.

[88] Sally Riggs Fuller and Ramon J Aldag, 'Organizational Tonypandy: Lessons from a Quarter Century of the Groupthink Phenomenon' (1998) 73 Organizational Behavior and Human Decision Processes 163. This assumption has been relaxed as it is now considered that antecedent conditions are not necessarily cumulative.

groupthink to occur, its importance in real-world decision-making has been later challenged – yet, it is still worth mentioning[89]. Cohesiveness is defined as the "solidarity, esprit de corps, team spirit, morale" of a group translated through "uniformity of conduct, attachment to the group, and mutual support between members"[90]. Such a de-individualisation of the individual – a factor equally responsible for group polarisation – then translated through his group behaviour is in accordance with the well-accepted fact that we possess two types of identities, personal and social, the latter corresponding to our group memberships[91]. Those were already considered by studies on the US Courts of Appeals:

> The fact that appellate court judges are readily recognised by themselves and others as belonging to an unambiguously defined group (a court) may enhance the likelihood that **they will incorporate their group membership into their concept of themselves**. In other words, the fact that judges see themselves as members of a distinctive institution (a court) and that others see them that way too, suggests **that judges might be especially attentive to the norms and expectations that attach to the members of their small group[92]**.

[89] Ibid.

[90] Michael Hogg and Graham Vaughan, *Social Psychology* (8 edition, Pearson 2017), 293. ('One of the most basic properties of a group (…) The term may also capture the very essence of being a group as opposed to not a group – the psychological process that transforms an aggregate of individuals into a group')

[91] Tajfel and Turner (n 10).

[92] Martinek (n 15), 77. Emphasis added.

Analogously, arbitrators evolving in the same type of setting – tribunals of three drawn from a larger community – it is realistic to expect this de-individualisation, social identity, in that framework as well.

C. Groupthink in an Investment Court?

As briefly mentioned in the introduction, this reform defended by the EU aims to remedy some criticisms feeding the backlash against ISDS[93]. In this context, it is worth considering whether this new design is "optimal" (i.e. in not promoting group decision-making errors but rather in getting closer to the requirements of rational judgment). After all, there is the possibility that those are not that different from ad hoc tribunals from a socio-psychological perspective; plus, the judicial decision-making literature dealing with domestic courts has consistently (empirically) demonstrated that such a setting does not prevent behavioural factors to have a role on the decision-making of its members (judges), especially as regard the way they tend to treat conflicting evidence. The question is therefore: what could we expect from ICSs, could groupthink equally play out? Those investment courts having not come into practice yet, we can only conjecture whether their features will promote or not the occurrence of this phenomenon; this latter being contingent on the fulfilment of antecedent conditions.

ICSs have been sketched in a number of recently negotiated comprehensive Free Trade Agreements (FTAs) or IPAs between the EU and some of its partners. Therefore, this

[93] Though to a limited extent as ICSs or a MIC will still co-exist with ad hoc tribunals owing to the States that will not consent to the court's jurisdiction.

analysis focuses on the provisions adopted in the EU-Canada Comprehensive Economic Trade Agreement (CETA)[94], in the negotiated EU-Vietnam IPA (EUVIPA)[95], and the signed EU-Singapore IPA (EUSIPA)[96] – agreements that are published in full – but also on the negotiating directives for the establishment of a MIC[97] providing some general indications on the substance of the negotiations. Whereas the ICS framework keeps the resolution of investment disputes within a small group of three (unless chosen otherwise by the parties), this division is to be drawn from a limited number of tenured Members previously appointed by the relevant Committees[98]. It shall be noted that this number will always be a multiple of three as their partition is to be equally split between nationals of the EU, nationals of the other contracting party, and nationals of third countries (not part of the agreement)[99]. In fact, this reflects the requirement that each division shall always consist in Members of each type with its chair being the Member national of the third country in any event[100].

[94] CETA, Chapter 8 on Investment: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 26 March 2019.

[95] EUVIPA, Chapter 3 on Dispute Settlement: <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf> accessed 26 March 2019.

[96] EUSIPA, Chapter 3 on Dispute Settlement: <https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=29> accessed 26 March 2019.

[97] Council of the EU (n 5).

[98] CETA (n 94), Article 8.27§2, §6, §9. EUVIPA (n 95), Article 3.38§2, §6, §9. EUSIPA (n 96), Article 3.9§2, §7, §9.

[99] CETA (n 94), Article 8.27§3. EUVIPA (n 95), Article 3.38§3. EUSIPA (n 96), Article 3.9§3.

[100] CETA (n 94), Article 8.27§6. EUVIPA (n 95), Article 3.38§6. EUSIPA (n 96), Article 3.9§7.

On groupthink in this framework, the implementation of a limited number of tenured might increase the level of cohesiveness between Members in reinforcing their relationships and promoting a certain uniformity in their conduct due to repeated interactions but also to the Working Procedures they will all be subjected to[101]. Such recurrent contacts might even promote the insulation of the Tribunals' (Investment and Appeal) Members from the wider "close-knit" arbitral community (composed of practitioners and academics) but also favour their homogeneity: two other antecedent conditions of groupthink[102]. Indeed, we could expect that the tiniest the group, the strongest the feeling of belonging to it expressed by an individual might be.

The lack of leader impartiality and of procedural norms also constitute structural faults that participate to the occurrence of groupthink. It is worth noting that the latter could even facilitate the appearance of the former. Yet, it would be quite paradoxical for an Investment Court – notably implemented to respond to the alleged lack of independence and impartiality of arbitrators – to either present or enhance (compared to ad hoc arbitration) those characteristics. Hence, the question: How does it (purportedly) account for them? The newly ICSs created by the CETA, EUVIPA, and EUSIPA explicitly provide for ethical requirements and forecast the need for a Code of Conduct for Members which shall deal among other things with the Members' independence and impartiality[103]. However, while the

[101] CETA (n 94), Article 8.27§10. EUVIPA (n 95), Article 3.38§10. EUSIPA (n 96), Article 3.9§10.

[102] In addition to such repeated interactions and common Working Procedures, the strict prohibition to wear a double-hat (i.e. acting as a counsel or as party-appointed expert or witness) might increase the level of cohesiveness, insulation, and homogeneity of the Tribunals: CETA (n 94), Article 8.30§1. EUVIPA (n 95), Article 3.40§1. EUSIPA (n 96), Article 3.11§1.

[103] CETA (n 94), Article 8.30. EUVIPA (n 95), Article 3.40. EUSIPA (n 96), Article 3.11.

Code of Conduct is already annexed in the EUVIPA and EUSIPA, its adoption is left to the CETA's Committee on Investment and Services. Equally, the Working Procedures are to be detailed later by the Tribunals and/or Committees[104]. Therefore, if properly drafted, those documents could tackle those conditions in (or limit their weight on) Tribunals. Yet, not only the impartiality of all Members needs to be considered, but the one touching upon the leader is of particular importance as well – as it has already been proven that leadership power can impact the whole decision-making processes[105]. In the context of these new ICSs, it is reasonable to assume that this role will be taken by the Members of third countries as they are exclusively entrusted a number of responsibilities[106]. Indeed, compared to their colleagues (i.e. nationals of the Contracting Parties) only those can pretend to be the chair of the division, the President or Vice-President of both the Investment and Appeal Tribunals, sole arbitrator, and are the ones in charge of the composition of the divisions after submission of a claim[107]. Thus, this unbalance of power equally needs to be later carefully controlled.

[104] CETA (n 94), Article 8.27§10. EUVIPA (n 95), Article 3.38§10. EUSIPA (n 96), Article 3.9§10.

[105] Broude (n 16), 1147 ('Formal leadership (e.g. the position of chief or chair of a judicial division) as well as social leadership roles in courts can influence the independence of judicial colleagues' opinions, reducing the likelihood of dissent').

[106] This assumption is justified due to the Tribunals' infancy preventing any leadership arising from other considerations (e.g. seniority, level of expertise, qualifications) as the agreements provide certain requirements to become a Member: CETA (n 94), Article 8.27§4. EUVIPA (n 95), Article 3.38§4. EUSIPA (n 96), Article 3.9§4.

[107] CETA (n 94), Article 8.27§6, §8, §9. EUVIPA (n 95), 3.38§6, §8, §9. EUSIPA (n 96), Article 3.9 §6, §7, §9 (Selection which shall be 'random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve').

Groupthink theory also considers the impact of a provocative situational context. Those conditions, dealing with high stress and low temporary self-esteem induced by a number of factors, are in fact quite specific to the individual Member or to the decision-making task at hand (i.e. the resolution of the submitted investment dispute). Thus, it makes it difficult – not to say impossible – to conjecture on their potential influence in the general framework of an Investment Court not operational yet. Nevertheless, we could still expect that in this new system comprising an appeal mechanism and tenured Members paid a retainer fee, those characteristics might not weight as much as in party-appointed ad hoc arbitration[108].

Finally, the point of groupthink is the concurrence-seeking tendency it leads to, alimented by those antecedent conditions and expressing itself with a number of symptoms and defects in the decision-making process, inevitably affecting the outcome. Yet, the EUVIPA in explicitly setting consensus as a primary decision-making rule, we could expect this requirement to enhance this tendency to strive for unanimity at no costs (or at least not reducing it in any case)[109].

[108] E.g. As with those new characteristics they are provided with *job security*, their nominations not being dependent on the disputants: CETA (n 94), Article 8.27. EUVIPA (n 95), Article 3.38. EUSIPA (n 96), Article 3.9.

[109] EUVIPA (n 95), Article 3.38§12. ('Every effort' shall be made to reach the decision by consensus, and if not possible, this should be achieved by majority vote).

IV – Yet, Crowds Can Be Made Wiser.

It follows from the above that while ad hoc tribunals and Investment Court(s) principally differ in their structure, they are similar as to the social influences they could be subjected to. Therefore, both frameworks could benefit from the implementation of remedies designed to tackle or attenuate those faulty processes. Indeed, although those latter are inherent to group decision-making, it does not mean that we need to return to individual decision-making – also presenting limitations – as collective settings present advantages if carefully designed (i.e. behavioural influences factored in when the institution is conceived). Besides, the identification of those defects constitutes the first step towards that aim (i.e. the creation of optimal (in not subjected to social influences but getting closer to the requirements of rational choice) decision-making bodies), the second being the implementation of the corresponding remedies[110]. Therefore, this section now deals with the translation of those into an Investment Court as this seems to be the way forward of the ISDS reform, but also because the generality of the actual provisions – letting the specifics (or practicalities) to be decided by some Committees or the Tribunals themselves – provides us with a margin for improvement or adaptation to the realities of group decision-making. Yet, those guidelines are equally relevant to ad hoc arbitration (as subjected to those same influences) and should be considered through the adoption of targeted reforms.

A. Remedies.

[110] Clark McCauley, 'Group Dynamics in Janis's Theory of Groupthink: Backward and Forward' (1998) 73 Organizational Behavior and Human Decision Processes 142, 143.('any theory of how decision-making can go wrong must contain at least the seeds of a theory of how decision-making can go right').

As the less than optimal outcome arrived at through groupthink – or equally group polarisation – phenomena is due to informational and social factors, it is no surprise that the remedies focus on those aspects. Hence the general advice that "devices and procedures that **maximise the effective participation** of all group members to ensure **greatest exposure of relevant ideas and information**" should be designed[111]. This guideline is in fact a mere reflection of the literature treating the maximisation of information and communication as two necessary conditions for optimal decision-making:

> ideal decision-making emerges as the inverse of the definition of groupthink and the specification of its failing: the essence of the ideal is maximising search and evaluation procedures[112].

Accounting for those, the founders of groupthink theory then prescribed seven remedies thought to induce high-quality decision-making (in preventing a concurrence-thinking tendency) consisting in a thorough canvassing of alternatives and objectives, a careful evaluation of the consequences, a thorough search for information, an unbiased assimilation of new information, a careful re-evaluation of consequences, and a thorough planning for implementation contingencies[113]. Thus, those resemble (not to say match) the finding of Cass

[111] Brown (n 14), 218. Emphasis added.

[112] McCauley (n 110), 144. The opportunity to communicate being a necessary but not sufficient condition to achieve an efficient outcome: Elliott and McKee (n 52).

[113] Janis and Mann (n 58). See also: Irving L. Janis, *Crucial Decisions: Leadership in Policy Making and Crisis Management* (Free Press 1989). Patricia J. Hollen "Psychometric Properties of Two Instruments to Measure

Sunstein – studying group polarisation – that groups need 'full information, not only about facts but also possible options and values', yet with the caveat that if they do possess it, this precondition of full information makes the group setting (i.e. the need for deliberation) quite redundant and hence useless[114]. Accordingly, the conclusion that what matters the most might not be to have full information – which is in fact be impossible to achieve due to the limited cognitive abilities of an individual and the environmental constraints – but making sure that the decision-makers are confronted to 'a range of reasonable alternatives'[115].

This thus leads us to the importance of (effective) communication within the group so that one view is not privileged over the other owing to social influences (e.g. conformity, hidden profiles, polarisation)[116]. As homogeneity is also thought responsible for groupthink faulty processes, it was equally considered that the heterogeneity of views should be guaranteed. According to Cass Sunstein, for heterogeneity to occur:

> What is necessary is not to allow every view to be heard, but to ensure that no single view is so widely heard, and reinforced, that people are unable to engage in critical evaluation of the reasonable competitors[117].

Regarding group decision-making defects resulting from such homogeneity in views leading in turn to biased information sampling – one groupthink defect – a division of labour and

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Quality Decision-Making" (1994) 17 Research in Nursing and Health 137 (elaborating on the practical implications of each of these seven steps).

[114] Sunstein (n 57).

[115] Ibidem, 30.

[116] See above for the literature on those effects.

[117] Sunstein (n 57), 28.

expertise within the group, along with the members' awareness of such a partition and of their colleagues' knowledge, abilities, and expertise should reduce the risk of having some unshared information within the group[118]. Additionally, Edwin Locke and his colleagues claimed that effectiveness should be enhanced if the group is constituted of members of high ability and knowledge relevant to the task at hand, if individual and collective interests are integrated, and if each member take "personal responsibility for thinking independently and completing specific tasks"[119].

Now that the two main sources of less than optimal, non-efficient decision-making have been clarified, what do they entail into practice? How do we ensure that our institutions (i.e. courts and tribunals) do not promote those behavioural influences? Recognising the significance of behavioural sciences' findings on group performance, Reid Hastie and Cass Sunstein similarly studied the means by which groups fail and provided eight 'practical' ways to make them wiser[120]. Four of those are discussed here as they are realistically suitable for an implementation in ISDS: promoting inquisitive and self-silencing leadership, encouraging critical thinking, rewarding group success, and using of the Delphi Method so as to maximise

[118] Dennis D. Stewart and Garold Stasser, "Expert Role Assignment and Information Sampling During Collective Recall and Decision Making" (1995) 69 Journal of Personality and Social Psychology 619.

[119]Edwin A Locke, Diana Tirnauer, Quinetta Roberson, Barry Goldman, Michael E. Latham, and Elizabeth Weldon, 'The Importance of the Individual in an Age of Groupism' in Marlene E Turner (ed), *Groups at Work: Theory and Research* (Routledge 2000), 522. The need for a collective outcome (i.e. a common interest) being also a necessary condition for group efficiency: Elliott and McKee (n 52).

[120] Sunstein and Hastie (n 53).

information processing[121]. It is also worth noting that those ways would not be more burdensome in terms of costs and speed as compared to what we know already as they would not entail the addition of any step but would be simply applied to what already exists in the current ad hoc tribunals or in the ICSs. Indeed, the guidelines related to leadership and critical thinking require the President of the tribunal or Chair of the division to indicate at the outset that he or she wishes a full deliberation on the collected information (i.e. not only focusing on the group's initial preferences); the one on rewarding success involving the imposition of a collective interest for decision-makers (e.g. through social norms or material incentives); while the Delphi Method is just another mode of deliberation used to get rid of social influences and to promote an equal participation of the members in the discussion[122]. Therefore, what is needed is the addition of those rules of conduct or procedures in the ISDS framework to make those bodies (tribunals and divisions) wiser.

[121] Ibid. On the ones not suitable for ISDS or difficult to transpose: the appointment of contrarian teams or of a devil's advocate, a change of perspective, and having different members with different information (as arguments are equally submitted by the parties to all decision-makers).

[122] Ibid, 121-122. (On the Delphi Method: 'First, it ensures the initial anonymity of all members through purely private statement of views. (…) Second, people are given an opportunity to offer feedback on one another's views. (…). Finally, and after the relevant communication, judgments of group members are elicited again and subject to another statistical aggregation'). See also Timothy W McGuire, Sara Kiesler and Jane Siegel, 'Group and Computer-Mediated Discussion Effects in Risk Decision-Making' (1987) 52(5) Journal of Personality and Social Psychology 917: note that computer-mediated deliberation presents the same effects (i.e. maximising information processing and eliminating social influences).

B. Opportunities for Improvement in the ICSs.

First of all, those defects being rooted in the members' willingness to strive for unanimity (i.e. groupthink's concurrence-seeking tendency), it means that procedural norms and particularly the decision-rule of the Tribunals is of particular importance. Yet, the EU ICSs seem to favour consensual decisions – at least in the negotiated EUVIPA– over the ones reached by majority only. This preference could be detrimental to decision-making in encouraging self-censorship from a dissenter. Consequently, it would be beneficial to promote a majority decision instead, or alternatively not to say anything privileging a concurrence-seeking tendency. Similarly, it would also be worth encouraging self-silencing and inquisitive leadership, so as to encourage such minorities to express their viewpoints, hence enriching the debate. As the opportunity for improvement of ICSs (only generally theorised now, not yet implemented) lies on the shoulders of the different Tribunals and Committees (i.e. through the adoption of the Code of Conduct for Members and/or of the Tribunals' Working Procedures), those measures could be transposed in their forthcoming documents. Still on the leadership's position, this latter being entrusted to Members nationals of third countries, it will be necessary to control their prerogatives in either of those texts (in addition to the already proclaimed standards of independence and impartiality bearing on all Members) – as such discrepancies between high- and low-status are responsible for less than optimal decision-making processes.

More generally, the remedies previously mentioned all endorse the rational choice theory requirements: the maximisation of information search and evaluation. Indeed, groupthink defects could be counteracted if appropriate procedures touching upon

information processing were designed. In fact, the more information is gathered and comprehensively evaluated, the less uncertainty will be at play, and in turn, the less political or organisational concerns will impact the decision-making process, consequently leading to a better process and then outcome. However, those procedures shall be appropriately designed so as to avoid hyper-rationality in turn leading to a blockage in decision-making[123]. Therefore, the Working Procedures to be drafted by the Tribunals could implement some of the mechanisms advised by Cass Sunstein and Reid Hastie to achieve wisdom in decision-making such as the priming of critical thinking and the Delphi Method in order to maximise the information search and evaluation phases, without in the meantime engendering unfeasible, long and costly procedures. Moreover, the MIC being mainly drawn from the existing ICSs, these recommendations should also be considered in the current negotiations.

V. Conclusion.

Starting with the backlash against arbitration, this paper sought to demonstrate that the EU proposal to replace the current ISDS system by an Investment Court is mainly responding to institutional concerns, not behavioural ones. However, the emergence of behavioural economics – challenging the rational choice theory (or economics) – forces us to consider the role of psychological influences bearing on adjudicators in the design of any decision-making body. It was thus posited that accounting for human behaviour – through the findings of social psychology in particular – could greatly benefit to understand and optimise

[123] Gary A Klein, *Sources of Power: How People Make Decisions* (20th Anniversary Edition, MIT Press 2017), 261. ('Hyper rationality is a mental disturbance in which the victim attempts to handle all decisions and problems on a purely rational basis, relying on only logical and analytical forms of reasoning')

the working of such adjudicative institution. To do so, this paper focused on the group dynamics literature emphasising the impact the social environment on decision-making. It was revealed – applying groupthink theory to the current system of ISDS and an Investment Court as defended by the EU – that those mechanisms are already or could be subjected to socio-psychological influences.

This endorsement of defects resulting from group settings in turn implies that they could be further improved if properly accounted for. This is why some guidelines as to the relevance of some proposed remedies have been formulated. In fact, the institutionalisation of ISDS advocated by the EU might not sufficiently tackle these socio-psychological influences. Indeed, this paper demonstrated that decision-making shortcomings have much to do with the processing – search and evaluation – of information impacted by a number of influences be they organisational or political. Accordingly, those latter need to be carefully considered not only in the Code of Conduct and Working Procedures to be drafted and the current discussions on the establishment of a MIC, but also in the current system through light-touch reforms. While further research is needed on the subject, this preliminary contribution mainly aimed to shed light on the potential offered by a behavioural analysis of decision-making bodies.